ALAN MCKNIGHT

v.

TAN CHONG & SONS MOTOR CO. SDN. BHD.

HIGH COURT MALAYA, PENANG
GUNN CHIT TUAN J
[CIVIL SUIT NO. 58 OF 1979]
5 JANUARY 1982

CONTRACT: *Sale of motor car - Whether subject to Australian Design Rules (ADR) - Buyer's order - ADR not mentioned - Contract - Whether written and any collateral - Oral agreement - Prior to signing buyer's order - Whether binding - Breach of - Damages.*

The plaintiff, an Australian service-man in this country sued the defendant for damages for breach of an agreement under which the defendant sold to him a motor car Datsun 260C automatic motion wagon. The plaintiffs claim was that the defendant had expressly warranted by his representative that the motor car would comply with and meet all requirements of the Australian Design Rules (ADR) or at least that the representations did amount to an implied warranty that the car complied with the ADR.

The plaintiff's evidence was that he was entitled to purchase a motor car duty free in Malaysia and to take it back to Australia when his tour of duty ended without paying any duty in Australia. The plaintiff said he informed the defendant's representative one Mr. Sze, (DW1) during the first week of 1978, he wanted a car which must conform with the ADR because he intended to take it back to Australia and DW1 claimed that he could sell him such a car which he would have to import from Japan.

On 6 January 1978 at the second meeting DW1 informed the plaintiff in the presence of another Australian service-man Lieut. Francis Drake (PW2) and his wife that he had cabled Japan for a white Datsun 260C which complied with the ADR to be delivered at Singapore and that he was waiting for a reply. About 3 days later DW1 again in the presence of PW2 and his wife produced a document and read it to the plaintiff that Nissan Motor Ltd. of Japan was taking a car from their Australian assembly line and shipping it to Singapore.

About two nights later, the plaintiff signed some customs exemption forms and DW1 informed him that the motor car he was buying would not have a compliance plate to show that the vehicle complied with certain ADR. Before a car could be registered in Australia, it must have either a compliance plate or a letter of guarantee. DW1 showed him such a letter which was given by the defendant to another Australian serviceman and promised to give the plaintiff a similar letter when he took delivery of the car. Sometime in May 1978 after delivery of the car, the plaintiff was given a letter which did not contain words amounting to a guarantee that the car conformed with ADR. As the plaintiff did not obtain the letter of guarantee although he made several trips to the defendant, he instituted this action.

The defendant's principal witness DW1's evidence was that the plaintiff did not mention to him about the ADR. On 9 January 1978, he went to see the plaintiff who signed the buyer's order and the customs papers for submission to the defendant's Headquarters. He personally delivered the car in May 1978 to the plaintiff, who had a few complaints about the tail light, glass etc. but did not complain that the car did not comply with the ADR. DW1 denied that he had ever promised the plaintiff to get a letter from Nissan Japan to say that the car complied with the ADR.

Counsel for the defendant contended that the buyer's order being a written contract made between the parties hereto in respect of the purchase of the motor car had set out fully the terms and conditions of the sale of the car and that there was no mention of the ADR in the order form. Counsel submitted that since there was a written contract governing the sale and purchase of the car, no oral evidence should be admitted by the Court to contradict, vary, add to or subtract from the terms of the written contract. Counsel also referred to the following condition appearing on the back of the buyer's order marked as (Exhibit D1):

> No guarantee or warranty of any kind whatsoever is given by the company in respect of the vehicle, the subject of the order, unless such guarantee and/or warranty is expressly stipulated in writing hereto, but the buyer/hirer shall be entitled to the benefit of the manufacturer's warranty.

and contended that any separate oral agreement must not be inconsistent with that condition. Counsel further contended that if at all the plaintiff had any cause of action it should be based on a contract collateral to the main contract i.e. Exhibit D1. He stated that the plaintiff had failed to plead the existence of a collateral contract and was bound by his pleading, and in the absence of a plea of the existence of a collateral contract, the plaintiff's action must fail.

In reply, Mr. Vello Senior Counsel for the plaintiff, contended that Exhibit D1 was only a buyer's order or a formal confirmation of purchase. He said that although Exhibit D1 was dated 9 January 1978 it was confirmatory that prior to that date there was an oral agreement to purchase the motor car and Exhibit D1 merely confirmed the purchase. He also said that Exhibit D1 was not complete and did not contain full details such as the year of model and the date of delivery of the vehicle ordered. He submitted that there was only one agreement for the purchase of the vehicle which was partly oral, partly written and partly by conduct. There was no collateral agreement which the plaintiff had relied on and which must be pleaded in the statement of claim and the Court was entitled to look at all the evidence to determine bargain struck between the parties.

Held:

[1] The defendant was the seller of Datsun cars in the course of its business and plaintiff as buyer had expressly or by implications made known to DW1, an agent of the defendant, the particular purpose for which the car was being bought namely for temporary use in Malaysia and eventual export back to Australia. There was therefore an implied condition that the car supplied under the contract was reasonably fit for that purpose, whether or not such cars are commonly supplied by the defendant for use here and eventual export to Australia.

[2] To call the warranty in this case collateral was misleading and it should be distinguished from a genuine collateral contract separate from a main contract.

[3] This was a "consumer sale" within the meaning assigned to it in s. 55(7) of the English Sale of Goods Act 1979 and that in this case of a contract of sale of a car, the terms of so-called condition appearing on the back of buyer's order (Exhibit D1) which purports to exempt the agreement from the provisions of s. 14 of the said Act was void and unenforceable as it was not only repugnant to the oral promise but would also not be fair or reasonable to allow reliance on that term or condition in the circumstances of this case.

[4] General damages of $10,500.00 plus interest at 8% from date of writ to date of payment and costs on the subordinate Courts scale as the sum recovered was less than $25,000.00.

[Judgment for the plaintiff.]

For the plaintiff - N.T. Vello
For the defendant - Louis Edward Van Buerie

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Also found at [1982] CLJ 313